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No. 90-1037

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

This case presents an important issue of constitutional law that has not been, but should be, settled by this Court: whether the Fifth Amendment requires a State to provide just compensation for the nonconsensual taking of uniquely valuable human bodily materials, when those materials are subsequently exploited by the State for commercial gain. Resolution of this issue is critical to the orderly and humane development of biotechnology and medical science. None of respondents' arguments supports denial of certiorari.

ARGUMENT

1. This Court's guidance is badly needed in this confused area of constitutional law. *See* Pet. 19-20. As one commentor recently observed, "[r]apid advances in biotechnology and medical science are creating new uses for many bodily tissues that were once thought to have no value beyond their original functions." [1] This burgeoning technological and scientific area has become commercialized, "creat[ing] a market place in which human tissues are routinely sold to and by scientists, physicians and others." *Brotherton v. Cleveland*, 923 F.2d 477, slip op. at 12 (6th Cir. 1990). This lucrative new industry [2] has brought with it previously unencountered legal issues. In particular, courts are more and more often confronting the fundamental issue whether an individ-

[1] Note, "She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 Colum. L. Rev. 528, 528 (1990) [hereafter "Note"].

[2] As of 1985, over $2.6 billion had been invested in biotechnology firms. Tompkins, *Capitalizing in Life*, Sci. Dig., June 1986, at 33. That number has surely been dwarfed by investment during the past five years. The market potential of products from the cell-line created from petitioner's cells has been predicted to be hundreds of millions of dollars by the 1990s. Hundreds of thousands of dollars have already been paid to respondents based on products derived from petitioner's body.

ual's blood, tissues and other bodily substances—the raw materials for this new industry—fall within the ambit of the constitutional protections afforded property by the Fifth and Fourteenth Amendments.

Since the filing of Moore's petition, the Sixth Circuit has ruled that an Ohio woman has a constitutionally protected property interest in her deceased husband's corneas. *Brotherton v. Cleveland*, 923 F.2d 477 (reversing dismissal of widow's section 1983 claim for coroner's wrongful removal of corneas for use by eye bank). Thus, pursuant to the Sixth Circuit's decision, a person has a protected property interest in the body parts of *another deceased* individual, whereas, under the California Supreme Court's decision, an individual does not have a protected property interest in his *own* body parts *while living*. The incongruity of these disparate conclusions illustrates the need for this Court to resolve the fundamental constitutional question presented here: whether the Fifth Amendment embraces an individual's interest in his economically valuable bodily materials.

Respondent Quan forthrightly admits that this issue is "of great public importance." Quan Opp. 5 n.2. Respondent Golde's ill-conceived "policy arguments" against granting certiorari also concede the importance of this case: like Quan, he asserts that medical research will grind to a halt should physicians and researchers be compelled to compensate the patients whose bodily organs, cells, and fluids they excise and exploit for enormous financial gain. Golde Opp. 20-21.[3] Indeed, Golde main-

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[3] Golde's suggestion that the Court's decision will not affect private entities is clearly wrong. Golde Opp. 20 n.12. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), for example, this Court analyzed under the Just Compensation Clause a California Supreme Court decision refusing to recognize a private shopping center's trespass action against private citizens intending to engage in speech activity on the premises. *See id.* at 82 ("[T]here has literally been a 'taking' of the right [to exclude others] to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.") Similarly, were Golde a

tains that achieving uniformity is so important it necessitates adoption of uniform laws by state legislatures. *Id.* 20 n.12. But the nonconsensual taking of a person's organs, blood, bone marrow aspirate, and/or other bodily substances, for the entrepreneurial benefit of the State raises profound Fifth Amendment concerns that are the special province of this Court to resolve.

2. Respondents admit—as they must—that Moore's Fifth Amendment claim ripened only when the State denied him just compensation. As this Court has explained, "the State's action is not 'complete' in the sense of causing a constitutional injury unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (internal quotation omitted). *See id.* at 194 n.13 ("[N]o constitutional violation occurs until just compensation has been denied.").

Nevertheless, respondents maintain that Moore somehow "waived" his Fifth Amendment claim by not raising it before the constitutional injury was complete. This argument is flatly contradicted by *Williamson County*, where this Court made plain that "the property owner *cannot claim* a violation of the Just Compensation Clause until it has used the [state] procedure and been denied just compensation." *Id.* at 195 (emphasis added). Until the California courts definitively denied Moore compensation, he had no Fifth Amendment claim to waive. Moore raised his claim as soon after the "taking" as possible: he alluded to the constitutional claim in his brief to the California Supreme Court, and squarely advanced it in his petition for rehearing after that court definitively denied his prayer for just compensation. Pet. App. 97a, 99a-100a.

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private physician, the California Supreme Court's ruling that state law affords Moore no property interest in his bodily substances would still constitute a "taking."

None of the cases cited by respondents holds that a takings claim must be raised in the state proceeding prior to the denial of compensation. Their reliance upon this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), is misplaced. Contrary to respondents' claims, *First English* did not set forth "the appropriate procedure for preserving a federal taking claim in state court." Golde Opp. 8. To the contrary, because the federal issue had been considered and decided by the state court there, this Court expressly did "not consider how or when the question was raised." 482 U.S. at 313 n.8.[4]

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[4] Quan's reliance on this Court's nearly 50-year-old decision in *Bailey v. Anderson*, 326 U.S. 203 (1945), is similarly misplaced. Quan's long quotation from the decision adroitly excises the basis for the Court's holding. *Bailey* reached this Court *on appeal*. The Court noted that in the state courts, the appellant had "failed to draw in question the constitutional validity of any statute as is required by § 237(a) of the Judicial Code," *id.* at 206, and the Court could not be sure that the state supreme court had passed upon that issue, *id.* at 206-07. In any event, the Court was not convinced that the act about which appellant complained—failure to include interest in an award—had actually occurred. The Court thus held that it was "without jurisdiction of the appeal." *Id.* at 207. This case comes to this Court pursuant to its *certiorari jurisdiction*, and petitioner need not call into question the validity of any state statute. Moreover, it is very clear that California has conclusively refused petitioner compensation for the conversion of his body parts by the State.

Golde's reliance on *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989), is perplexing. In *Peduto*, a property owner brought an inverse condemnation action in state court together with several federal constitutional claims, including a Fifth Amendment takings claim. The state court heard and rejected the federal constitutional claims on the merits. *Id.* at 728. The Third Circuit held that the State's claim preclusion rules did not allow the property owner to relitigate the same issues in federal court. *Id.* at 729. Nothing in the decision suggests that the property owner was *required* to litigate his federal takings claim at any particular phase of the state court proceeding, or that the state court was *required* to rule upon the merits of that claim. The court held only that having done so, the property owner could not reassert identical claims in a separate complaint in federal court.

Indeed, Moore's takings claim was more clearly presented below than was the takings claim deemed adequately raised and reviewed by this Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). There, the property owner made one reference to unspecified "pertinent provisions of the *Florida Constitution* and its Federal counterpart," in its opening brief at the intermediate appellate level, and made "due process" arguments—again without citing the Federal Constitution—in its reply brief. *Id.* at 159 n.5 (emphasis in original). In the state supreme court, there was no specific reference to the *federal* Constitution in either the briefs or the court's opinion, although the court mentioned the argument that the statute at issue "constitute[d] either a taking without due process of law or an unlawful tax" and concluded that there was "no unconstitutional taking." *Id.* Based on this record, this Court ruled it could properly consider the federal takings issue (and held a taking had occurred).[5] Here, Moore did far more: He clearly invoked the *federal* Constitution, asserting the Fifth Amendment and the language of "due process" (as in *Webb's Fabulous Pharmacies*) in his brief before the California Supreme Court. Pet. App. 97a. And he alleged an unconstitutional "taking without just compensation" under the *federal* Constitution at the first opportunity after the violation occurred. Pet. App. 99a-100a.

Respondent Regents' contention that Moore waived his takings claim by not bringing an inverse condemnation action is contradicted by the many cases in which this Court has addressed Fifth Amendment claims in other contexts.[6] For example, the takings issue in *PruneYard*

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[5] *Webb's Fabulous Pharmacies* clearly refutes Quan's contention that Moore was required to advance his federal takings claim in his complaint. *See* Quan Opp. 6 n.4.

[6] The sole case upon which Regents relies for this proposition, *Cassettari v. Nevada County, Cal.*, 824 F.2d 735 (9th Cir. 1987), held only that until a property owner seeks to obtain compensation for an alleged taking pursuant to state procedures, his Fifth

arose in the context of a lawsuit by handbill distributors alleging a First Amendment and state constitutional right of access to a private shopping center. The Court explicitly stated that the action was not a "condemnation case," but nevertheless concluded that the Fifth Amendment issue was properly presented. 447 U.S. at 82 n.5. *See also Webb's Fabulous Pharmacies, supra* (addressing takings claim arising in an interpleader action pertaining to a sales agreement).

Moore sought compensation through his conversion claim for the total extinguishment of his property interest in his bodily substances.[7] The California Supreme Court reversed the intermediate appellate court and sustained the demurrers on that claim, on the ground that Moore had no property interest in his organs, cells, and bodily fluids once removed. In so holding, the court made clear that for that reason a claim for inverse condemnation (compensation for exercise of the power of eminent domain) was not available either. *See* Pet. App. 36a n.44. Clearly, Moore satisfied his obligation under *Williamson County* to seek compensation through state procedures. There has been no waiver.

3. Respondents do not dispute that the California Supreme Court finally and definitively resolved Moore's conversion claim, sustaining the demurrers and preclud-

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Amendment takings claim is "premature." *Id.* at 737-38. Although the court observed that an inverse condemnation claim was available to the property owner, *id.* at 738, the court did *not* hold that only invocation of that proceeding would be sufficient.

[7] Contrary to the Regents' suggestion, Moore's invocation of this conversion claim is entirely consistent with his takings claim. *See* Regents Opp. 9-10. At least one commentator has suggested that the law of conversion provides the correct method for ascertaining "just compensation" for the taking of bodily substances. Note, *supra* n.1, at 562. *See also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984) (instructing that methods of compensation other than fair market value immediately prior to the taking are appropriate "when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public").

ing amendment of the complaint on that claim. Nevertheless, they contend that the court's decision is not a final judgment within the meaning of 28 U.S.C. § 1257(a) because the court remanded Moore's entirely separate causes of action for breach of fiduciary duty or lack of informed consent. But, as in *First English*, the state supreme court has made a distinct ruling that controls the takings issue and will survive any further state-court proceedings: Moore is not entitled to compensation for the State's unconsented-to extraction and commercial exploitation of his bodily substances. *See* 482 U.S. at 309 n.3. Consequently, as in *First English*, that ruling is reviewable by this Court.[8]

4. Finally, respondents argue, on the merits, that the state court's holding that an individual retains no property interest in his bodily substances once removed precludes a finding that an unconstitutional taking occurred. Regents Opp. 4-8. This argument is wrong for two reasons. *First*, as the Sixth Circuit's decision in *Brotherton v. Cleveland* makes plain, although state law plays a crucial role in identifying interests protected under the Fifth Amendment, the issue whether a constitutionally protected property interest exists is ultimately a matter of *federal* law. Slip op. at 13, citing *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Indeed, the *Brotherton* court held that where the State conferred

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[8] Contrary to respondents' contentions (*see* Regents Opp. 1, 2; Golde Opp. 1) this Court cannot assume Moore validly consented to the surgical removal of his spleen. This case arises on demurrer and the allegations in Moore's complaint must be accepted as true: Moore alleges that his consent was fraudulently obtained and therefore neither "informed" nor valid. Moreover, Moore's conversion and takings claims pertain not only to the removal of his *spleen* without informed consent, but also the subsequent removal of *his blood and other bodily fluids without informed consent.* Complaint ¶¶ 30-53; Pet. App. 110a-126a. The complaint asserts these extractions had no *medical* purpose whatsoever. Complaint ¶¶ 33-34; Pet. App. 111a. Therefore, even if the trier of fact ultimately concludes that Moore knew of and consented to respondents' use of his excised spleen, Moore's allegations regarding the nonconsensual extraction of his other bodily substances would remain.

a "possessory right" to her deceased husband's body, a widow has a property interest protected by the federal Constitution *despite* the State's failure to classify it as such. *Id.* at 14.

Second, as discussed in the Petition, the aggregate of rights and interests recognized by California law rises to the level of a constitutionally cognizable property interest in one's bodily substances. *See* Pet. 15-16, 18-19. *See also Brotherton*, slip op. at 14 (State's Uniform Anatomical Gift Act evidences property right in bodily organs). Respondents entirely ignore these many indicia, all of which created Moore's reasonable expectation that he could control the use of his bodily materials, and reap a reasonable return for their commercial use. *See* Note, *supra* n.1 (individuals have a property interest in their bodily substances and the commercially exploitative uses to which they are put); Note, Toward the Right of Commerciality: Recognizing, Property Rights in the Commercial Value of Human Tissue, 34 U.C.L.A. L. Rev. 207 (1986) (same).[9]

Golde and Quan recognize that the state court's finding is not conclusive, but nevertheless argue that it disposes of Moore's federal claim because the court's decision " 'rests upon a fair or substantial basis.' " Golde Opp.

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[9] Golde argues disingenuously that "bodily materials lack the attributes ordinarily associated with property." Golde Opp. 15 n.6. As Golde is fully aware, Moore's cells have substantial intrinsic monetary value. More generally, although there are some limitations on the purchase and sale of organs (as there are regulations on the sale of many other types of property), individuals have for years sold their bodily substances—such as blood, semen, urine, sweat, saliva, and skin. *See* R. Scott, The Body as Property 190 (1980); *United States v. Garber*, 589 F.2d 843, 846 (5th Cir.) (discussing woman whose blood contained a rare antibody and who earned up to $1,600 per bleed and $200 a week, plus $25,000 cash, 1000 shares of stock, and use of a car in exchange for regular extractions of blood plasma), *rev'd on other grounds*, 607 F.2d 92 (5th Cir. 1979) (*en banc*). "In the biomedical marketplace, human tissue is commonly traded and sold and often is the subject of commercially valuable contracts." Note, Toward the Right of Commercially, 34 U.C.L.A. L. Rev. at 219.

14, quoting *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944). They contend that recognizing a retained property interest in Moore's cells after their removal would conflict with California Health and Safety Code 7054.4. But, as Moore demonstrated in his Petition, Section 7054.4 speaks only to the means by which removed bodily substances may be disposed of "*following the conclusion of scientific use.*" The provision does not in any way address the scientific use to which the substances may be put or who may exploit them for scientific purposes. It therefore cannot negate the individual's self-evident interest in controlling the commercial uses to which his organs and bodily fluids are to be put. Golde's response to this ineluctable conclusion is nonsensical. *See* Golde Opp. 16 n.7.

Moreover, respondents' argument, like the California Supreme Court's holding, misses the point. Moore argues not that he "retained" a property interest in his bodily material *once removed*, but that he had a property interest in his bodily materials *while they were part of his body* that gave him a right to control whether and for what purposes those materials would be extracted. The crux of Moore's claim is that his spleen and bodily fluids were extracted without informed consent; the "taking" was the unconsented-to removal of this valuable material from his body. As Golde effectively admits, the California Supreme Court recognized that an individual has a property interest—"a right of possession and control"—under California law in material that is part of his body. *See* Golde Opp. 15 n.6. The State deprived Moore of this right of possession and control—a right, Golde admits, that "resides at the very core of a property interest." *Id.* 17.[10] Yet the state court concluded that

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[10] The state court ruled Moore had a right to be informed of respondents' intentions prior to consenting to extraction. With such knowledge, Moore presumably could have sold the rights to the materials respondents coveted. By failing to inform him, and then declaring him to have no continuing rights once the material was

this property interest evaporates upon the material's non-consensual extraction, only to rematerialize in the hands of Golde, Quan, and the State as property surely protected from conversion by third parties. This uncompensated transformation of private property into public property—based entirely on *ipse dixit*—contravenes the principles established in *Webb's Fabulous Pharmacies* and *Demorset*. *See* Pet. 20-21.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,

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extracted without consent, the State deprived Moore of the right to sell the materials prior to extraction. That deprivation is a quintessential taking of property.